

Private foundation; control of corporation. A private foundation, owning 35 percent of the voting stock of a corporation and having a foundation manager personally owning the remaining 65 percent but not holding a position of authority in the corporation by virtue of being foundation manager, does not control the corporation for purposes of the self-dealing provisions of section 4941 of the Code.

Advice has been requested whether, under the circumstances described below, a corporation is controlled by a private foundation within the meaning of section 53.4941(d)-1(b)(5) of the Foundation Excise Tax Regulations.

Private foundation P owns 35 percent of the voting stock of corporation W. A, a foundation manager of P, personally owns the remaining 65 percent of the voting stock of corporation W. A does not occupy a position of authority in corporation W by virtue of being a foundation manager of P. Private foundation P does not have the right to exercise veto power over the actions of corporation W and has no authority over the corporation's actions other than that represented by its ownership of 35 percent of the voting stock.

Section 4941(a)(1) of the Internal Revenue Code of 1954 imposes a tax on each act of self-dealing between a disqualified person and a private foundation. Section 4941(d)(1) provides that the term 'self-dealing' includes both direct and indirect transactions between a private foundation and a disqualified person.

An example of an act of indirect self-dealing would be a transaction of the type described in section 4941(d)(1) of the Code between a disqualified person with respect to a private foundation and a corporation controlled by the private foundation within the meaning of section 53.4941(d)-1(b)(5) of the regulations.

Section 53.4941(d)-1(b)(5) of the regulations provides, for purposes relative to acts of indirect self-dealing under section 4941(d) of the Code, two basic tests for determining whether an organization is 'controlled' by a private foundation. There is control: (1) if the foundation or one or more of its foundation managers (acting only in such capacity) may, only by aggregating their votes or positions of authority, require the organization to engage in a transaction which if engaged in with the private foundation would constitute self-dealing; or (2) in the case of a transaction between the organization and a disqualified person, if such disqualified person, together with one or more persons who are disqualified persons by reason of such a person's relationship (within the meaning of section 4946(a)(1)(C) through (G)) to such disqualified person, may, only by aggregating their votes or positions of authority with that of the private

foundation, require the organization to engage in such a transaction. The regulation also provides that an organization will be considered to be controlled by a private foundation or by a private foundation and disqualified persons if such persons are able, in fact, to control the organization (even if their aggregate voting power is less than 50 percent of the total voting power of the organization's governing body) or if one or more of such persons has the right to exercise veto power over the actions of such organization relevant to any potential acts of self-dealing.

Because private foundation P owns only 35 percent of the voting stock of corporation W and because A, the foundation manager, holds no stock in his capacity as foundation manager and does not occupy a position of authority in corporation W by virtue of being a foundation manager, private foundation P does not, either alone or with A, its foundation manager (acting only in such capacity), control corporation W. Thus, corporation W is not controlled by private foundation P under the first test of the regulation.

Because A, the foundation manager, personally owns 65 percent of the voting stock of corporation W, he can control corporation W without aggregating his votes with those of private foundation P. Thus, private foundation P does not control corporation W under the second test of the regulation.

Moreover, private foundation P does not have the right to exercise veto power over the actions of corporation W, and private foundation P does not have authority over the actions of corporation W other than that represented by the 35 percent of the voting stock that it owns.

Accordingly, corporation W is not controlled by private foundation P within the meaning of section 53.4941(d)-1(b)(5) of the regulations.